SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 746

HOWARD LITTLE,

Petitioner,

-against-

CHARLES F. GREEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969
No.

HOWARD LITTLE,

Petitioner,

-against-

CHARLES F. GREEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 24, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit F. 2d and there were no opinions rendered in the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 24, 1970. A petition for

an enlargement of time and rehearing en banc was filed which petition was denied by order dated August 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Mandate Dated: July 27, 1970.

QUESTIONS PRESENTED

1. Is the principle of uniform and equal justice to all controlling on United States Courts of Appeal as to discretionary matters. Has an appellant the right to have a Court of Appeals review errors such as the Court has held by many prior decisions were reviewable?

2. Do statements to a jury by counsel as to the law to which exceptions are not sustained and, in substance, held to be correct, have the same legal effect as instructions by the Court?

3. Is a litigant entitled to clear, unambiguous, unconfusing and relevant instruction as to the law, free from unrelated and inapplicable instruction as to other irrelevant principles of law?

4. Is it basic error reviewable on appeal exception not having been taken, for a Court to fail to correct erroneous statements of the law by counsel and repeated appeals to bias, passion and prejudice, including reference to the fact that a judgment would have to be paid by one of their neighbors personally (a southerner) by reason of an action brought and tried by a New York attorney all statements properly excepted to.

5. Are comments by a Trial Court clearly conveying to a jury that the objections were not well taken by repeatedly stating "sit down" when objections were voiced, and informing the jury, in substance, that the statements objected

to were proper, comparable to and as effective as instructions by the Court?

REASONS FOR GRANTING THE WRIT

Petitioner was denied the benefit of uniform, fair and impartial administration of justice.

The Court below has enunciated a principle, that fundamental and basic errors of law, resulting in a miscarriage of justice, are not subject to review on appeal as a matter of right, but are lost if no precise exception is taken to the charge.

The Court below has enunciated a principle of law in conflict with its prior uniform holdings in other comparable situations.

The decision by the Court below has enunciated a principle of law that fundamental and basic rights are lost to a litigant if he does not take precise exception thereon, which holding is in conflict with the uniform and well established law enunciated by this Court and many other Courts of Appeal, as hereinafter more particularly shown.

The Court below has affirmed a judgment based on a verdict which was clearly the result of mis-statement of the applicable law, failure to clearly instruct as to the law of the case, bias, passion, prejudice and appeal to personality and economic harm that a verdict would cause to a local resident brought about by an action instituted and tried by a New York attorney, all of which constitutes a radical departure from the American concept of justice, as enunciated by this Honorable Court and uniformly by other United States Courts of Appeal.

There has been a complete reversal of the well

established law as enunciated by this Court that liability for breach of warranty of seaworthiness is not dependent on negligence, which principle was overruled, in substance, by the Court below affirming the correctness of the statement by respondent's counsel that in order for petitioner to be entitled to a verdict he had to prove that Charles F. Green personally committed a wrong or negligent act.

STATEMENT OF THE CASE

On the 6th day of January, 1966, petitioner had his right leg mangled aboard the shrimping vessel ROVING GAMBLER when caught by a cable wrapped around a drum when he attempted to correct an override by kicking the cable back into position.

In order to receive the benefit of Rule 56 of the Federal Rules of Civil Procedure, petitioner, for the purposes of the motion, consented to adopt the shipowner's factual version of the accident, thereby all controversial issues of fact were eliminated as to the physical condition of the work area and equipment involved.

The shipowner charged contributory negligence on the part of the seaman in using his foot instead of his hand to correct the override.

The shipowner did not put at issue any question as to the physical condition of the work area or the drum or cable involved.

The motion was denied.

At the trial, the same facts were urged as a basis for a directed verdict in the seaman's favor.

This motion was likewise denied.

In the absence of any controversial issue of fact as to the physical conditions of the work area and equipment, the matter was one within the exclusive province of the Court to decide as a question of law, and it was error for the Court to refuse to act in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure and the uniform and well established law laid down by this Honorable Court and other Courts, as hereinafter more particularly set forth.

The Master of the vessel was Captain Pacetti whose deposition was taken, which demonstrates the absence of any controversial issue of fact as to the unseaworthiness being the proximate cause of the accident.

The following are quotes from pages 47 and 48 of the Captain's deposition.

"Q. Shouldn't the cables wind on the drum evenly without having to resort to what you call kicking the cables?

A. Yes."

"Q. How would that have anything to do with his leg being caught in the drum?

A. Well, without it, he would have been able to disengage the friction.

Q. Yes, sir, but how would that have had anything to do with his foot being caught in the drum?

A. It would have — it wouldn't have had nothing to do with his foot being caught in it."

ARGUMENT

The argument making the granting of a writ one of general interest and in the furtherance of justice is primarily based on quotes from various decisions contrary to that by the Court below; as hereinafter set forth

"A verdict is contrary to law when influenced by bias, passion and prejudice."

"It is in the public interest for an appellate court to correct an unjust decision, irrespective of the failure of counsel to particularize the exception."

"Comments by counsel as to insurance and other appeals to passion and prejudice are grounds for reversal."

"An incorrect or confusing instruction as to the law of the case constitutes a denial of a fair and just trial."

"Fundamental error is a basis for appeal, irrespective of the fact that a precise exception was not taken."

The record is devoid of any adequate instruction as to the applicable law of the case, in total disregard of the fact that the applicable law is well settled and uniform.

District Judge Lawrence, in the case of *Sams v. Haines*, 299 F. Supp. 746 (1969) comments on this question as follows: (750)

> "If two men had been operating the winches it is possible that the accident would never have happened. The cable might not have bunched up. Sams might have been less careless had another man been present. The emergency under which he was apparently acting might not have presented itself. Of course, if Sams used his hand to guide the cable which was piling up on the drum he was negligent. But I do not find that his carelessness in that respect was the sole proximate cause of his injury. The insufficient crew was a causative factor therein."

(p. 749)

> "[2] [4] However, custom does not make seaworthiness. As observed by Judge Brown in the Fifth Circuit case of June T., Inc. v. King, 290 F. 2d 404, at 406: "What is customary in a trade may be evidence of due care—here the reasonable fitness element on the concept of seaworthiness—but it is not the legal measure of the duty." Nor is the fact that a three man crew is economically unfeasible."

The absence of a man at the cable to guide it while it was being taken up so as to prevent the foreseeable override constituted unseaworthiness, on the basis of the absence of a sufficient number of men to perform the work in question at the time in question.

Hussein v. Isthmian Lines, Inc., 405 F. 2d 946 (5 Cir. 1968)

In the light of the charge, the jury could not possibly understand that it would be justified in returning a verdict in favor of petitioner on the basis of liability without fault.

The Court recalled the jury and, in effect, took from the petitioner the right to obtain a verdict in his favor on the basis of unseaworthiness.

The Court's charge, in effect, was a directed verdict in favor of the respondent, as no seaman could ever recover a verdict in his favor for any accident brought about by an unsafe condition of the structure of the ship or its gear or appurtenances.

The decision by the Court below is in conflict with its prior decision in *Hussein v. Isthmian Lines, Inc., supra*, wherein the Court stated at page 947:

> "[1-3] The duty to furnish a seaworthy vessel (a vessel and appurtenances reasonably fit for their intended use) is absolute and is completely separate from the shipowner's duty under the Jones Act to exercise reasonable care. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549, 80 S. Ct. 926, 4 L. Ed. 2d 941, 948 (1960). This duty is a type of liability without fault and may be violated without regard to negligence. Seas Shipping Company v. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099, 1106 (1946). Since the record contains evidence from which the jury could have found that the appellant was required to work on a greasy ladder, and was not furnished the proper equipment to do the job assigned to him, the erroneous refusal to give the

requested charge was prejudicial. Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 482 (1967)."

In the case of [redacted] v. *Erie Lackawanna Railroad Company*, 387 F. 2d 996 (1968), the lower court adopted the conflicting principle, quoting from the decision in *Freifield v. Hennessy*, 353 F. 2d 97; 99 (3 Cir. 1965), as follows:

> "Where it is apparent on the face of the record that counsel failed to object to a fundamental and highly prejudicial error, and this failure may have resulted in a miscarriage of justice, the error must be noticed and rectified."

See also *Ratay v. Lincoln National Life Insurance Company*, 378 F.2d 209 (1967).

Also *Freifield v. Hennessy*, 353 F. 2d 97 (1965) where the Court held at page 99:

> "The defendant argues that since the plaintiff interposed no objection to the court's instructions he may not now complain of error therein. This argument is in accord with the general rule which is subject to exception. Hormel v. Helvering, 312 U.S. 552, 557, 558, 61 S.Ct. 719, 85 L. Ed. 1037 (1941); *Mazer v. Lipschutz*, 327 F. 2d 42, 52 (3rd Cir. 1964); *McNello v. John B. Kelly, Inc.* 283 F. 2d 96, 101, 102 (3rd Cir. 1960). *Callwood v. Callwood*, 233 F. 2d 784, 788 (3rd Cir. 1956). Where it is apparent on the face of the record that counsel failed to object to a fundamental and highly prejudicial error, and this failure may have resulted in a miscarriage of justice, the error must be noticed and rectified. Ibid. This exception to the general

rule is applicable to the instant case.

The judgment of the court below will be reversed and the action will be remanded with instructions that a new trial be ordered."

That the charge by the trial court was defective, and the court below in error is clearly demonstrated by the decision in the case of *Pritchard v. Liggett & Myers Tobacco Company*, 350 F.2d 479 (1965). Quoting from the concurring opinion of Circuit Judge Freeman, the following appears at page 487:

"The charge was defective not only for vagueness but also because of another error. It instructed the jury that they could not find an express warranty unless the seller 'actually intended to be bound by his statement.' Such a requirement is contrary to the law of Pennsylvania since the adoption of the Sales Act of 1915 by which Pennsylvania departed from its previous adherence to the English rule. See *1 Williston on Sales* (Rev. Ed. 1948). §§198-200; *cf. Rothermel v. Phillips*, 292 Pa. 371, 375-376, 141 A. 241 (1928). The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it. Act of May 19, 1915, P.L. 543, §12, 69 Purdon's Pa. Stat. Annot. §121; 1 Williston on Sales (Rev. Ed. 1948). §199."

The admission by the Captain that the cable was overriding is further proof of unseaworthiness.

Shannon v. U.S. 119 F. Supp. 706, rev'd on other

grounds, 235 F. 2d 457.

The overriding of a cable implies that it was either flat, kinky or had some other similar defect, or that there was some mal-alignment of the winch itself, and that, in and of itself, is likewise evidence of unseaworthiness. *Shannon v. U.S., supra; Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455.

In the case of *Hagans v. Farrell Lines*, 237 F. 2d 477, a drifting cable was held to constitute unseaworthiness.

Maccarone v. A/S Inger, 262 F. 2d 569, (overriding cable)

Imperial Oil, Ltd. v. Drilk, 234 F. 2d 4

Grillea v. United States, 232 F. 2d 919

In the case of *Brady v. Southern Railway Co.*, 320 U.S. 476, 479, the Court held as follows:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding."

The decision by the court below was in conflict with the Court of Appeals in the Fifth Circuit, in the case of *Dowell, Inc. v. Jowers*, 166 F.2d 214, where the court stated at page 221:

> "Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, provides that no party may assign as error the giving or failure to give an instruction unless he distinctly presents to the trial court

his ground for objection. This conforms to the practice generally followed in appellate procedure everywhere. Hence, the error in instructing the jury in this case cannot be complained of by the defendant. If it is considered at all, it must be on motion of the court. The court's right in a proper case to consider on its own motion errors patent upon the face of the record where no objection was made, was considered by the United States Court of Appeals for the District of Columbia in Shimabukuro v. Nagayama, 1944, 140 F.2d 13, 15. We find ourselves in thorough accord with the decision in that case.

'The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.

'But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. Mr. Justice Black has recently said: 'There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.' Hormel v. Helvering, 1941, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037.'

We think that in the interest of justice the court here must act upon its own motion. So acting, we hold that the trial judge's charge to the jury constitutes reversible error."

The decision by the court below was in conflict with the decision of the United States Court of Appeals, District of Columbia, in the case of *Shokuwan Shimabukuro v Higeyoshi Nagayma*, 140 F.2d 13, c.d. 322 U.S. 755, 64 S. Ct. 1270 where the court stated at page 15:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.[2]
>
> But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. [3] Mr. Justice Black has recently said: 'There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.'[4]
>
> Heretofore this court has noticed error which parties waived by failure to object at the trial court, to avoid injustice in criminal cases.[5] There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved, and our Rule 17(i), which states the principle, makes no distinction between civil and criminal actions."[6]

[2]Mr. Justice Stone in Duignan v. United States, 1927, 274 U.S. 195, at page 200, 47 S.Ct. 566, at page 568, 71 L.Ed. 996, said: 'This court sits as a court of review. It is only in exceptional cases coming here from the

federal courts that questions not pressed or passed upon below are reviewed.'

[3]Sibbach v. Wilson & Co. Inc. 1941, 312 U.S. 1, at page 16, 61 S.Ct. 422, at page 427, 85 L.Ed. 479, where Mr. Justice Roberts said: 'The District Court treated the refusal to comply with its order as a contempt and committed the petitioner thereafter. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37, it was plain error of such a fundamental nature that we should notice it. Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in Section (b) (2) (i) (ii) and (iii). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion.'

[4]Hormel v. Helvering, 1941, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037.

[5]Freed v. United States, 1920, 49 App. D.C. 392, 266 F. 1012; see Schwartz v. United States, 1926, 56 App. D.C. 105, 106, 10 F.2d 900, 901 (citing additional authorities). McAffee v. United States 1939, 70 App. D.C. 142, 150-151, 105 F.2d 21 (death penalty); McKenzie v. United States 1942, 75 U.S. App. D.C. 270 126 F.2d 533 (death penalty); Boykin v. United States, 1942, 76 U.S. App. D.C. 147, 130 F.2d 416 (appeal and record perfected under unusual circumstances).

6. Points Not Presented. Points not presented (errors not assigned in criminal cases from the district court) according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not presented or assigned.'

And see Neufield v. United States, 1941, 73 App. D.C. 174, 190, 118 F.2d 375, 391; 'A plain error may, of course be noticed, *especially* in a criminal case, even though not assigned.' (emphasis added)

The decision by the court below is in conflict with the decision in *Callen v. Pennsylvania R. Co.*, 162 F.2d 832, where in substance the court held that the court's error is not cured by the court's effort to explain the situation without charging on its own motion to disregard the erroneous construction of the law by defense counsel. The Court said at page 835:

> "That type of instruction was especially important in view of the confusion which had been created over the status of the release."

The affirmance by the lower court of the decision of the trial court, refusing to consider fundamental error, is in conflict with the holding in the case of *San Antonio v. Timko*, 368 F.2d 983 (1966), wherein the court held at page 986:

> Although defense counsel did not take exception to this, the impropriety of the argument was so flagrant as to constitute 'fundamental error'. New York Central R.R. v. Johnson, 279 U.S. 310, 318-319, 49 S.Ct.300,

73 L.Ed. 706 (1929), which we will consider on appeal even though the point was not raised at trial. Ferrara v. Sheraton McAlpin Corp. 311 F.2d 294, 297 (2 Cir. 1962); Dowell, Inc. v. Jowers, 166 F.2d 214, 221, 2 A.L.R. 2d 442 (5 Cir.). cert. denied 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759 (1948); Shokuwan Shimabukuro v. Higeyoshi Nagayama, 78 U.S. App. D.C. 271, 140 F. 2d 13, cert. denied, 322 U.S. 755, 64 S. Ct. 1270, 88 L.Ed. 1584 (1944); 5 Moore, Federal Practice § 46.02, pp. 1903-04. When we combine this episode with the previous improprieties in summation and the exceedingly thin character of the evidence, we are convinced the judgment cannot be allowed to stand. See F. W. Woolworth Co. v. Wilson, 74 F.2d 439, 442-443 (5 Cir. 1934).

The judgment is reversed and the cause remanded for a new trial."

The decision by the court below is in conflict with the decision by the United States Court of Appeals, 8th Circuit, in the case of *Harris v. Smith*, 372 F.2d 806 (1967), where the court stated at page 815:

"An additional ground of error, although not urged on appeal, should be noticed by this court because of its substantial effect upon the rights of the parties. It is within the discretion of this court to notice plain error in civil appeals. As the late Judge Thomas stated for this court in General Finance Loan Co. v. General Loan Co., 8 Cir. 1947, 163 F.2d 709, at 711:

'We may, however, in our discretion consider a plain error apparent on the face of the record for the purpose of avoiding a manifest miscarriage of justice,

or where the issue raised is one of public concern, even in a civil case. Kincade v. Mikles, 8 Cir., 144 F. 2d 784; National Aluminate Corporation v. Permutit Co. 8 Cir., 144 F.2d 93.'

See also, Andrews v. Olin Mathieson Chemical Corp. 8 Cir., 1964, 334 F. 2d 422, 428; Minneapolis St. P. & S. S.M. R. Co. v. Metal-Matic, Inc. 8 Cir., 1963, 323 F. 2d 903, 910."

The refusal by the court below to consider fundamental error is in conflict with the holding by the Court of Appeals in the 2nd Circuit, in the case of *Ferrara v. Sheraton McAlpin* Corporation, 311 F.2d 294 (1962), where the court stated at page 298:

"When the integrity of a trial court's judgment has been called into question by a substantial departure from those rules, an appellate court cannot put aside this responsibility merely because of the inadvertence of appellant's counsel at trial. That responsibility compels us to reverse this judgment.

Reversed and remanded."

The Supreme Court of the United States in *Brady, Admx. v. Southern Railway Co.*, 320 U.S. 476, 64 S. Ct. 232 (Dec. 1943) laid down the following principles of law as being controlling:

(p. 234)

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice

without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Since the early cases of *Elliott v. Chicago, M. & St. P. Ry. Co.*, 14 S. Ct. 85, 150 U.S. 245, and *Pike v. Grand Trunk Ry. Co.*, 39 F. 255, our Courts have uniformly held that the absence of an issue of fact in a personal injury action for damages, rendered the question one of law for the Court.

In the case of *Standard Oil Co. of New York v. R. L. Pitcher Co.*, 289 F. 678, the Court stated that while the question of what was proximate cause was ordinarily for the jury, yet, where the whole evidence offered not dispute upon material points, it became a question of law for the Court.

See also:

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189;

Wing v. Rockport Steamship Company, 30 F.R.D. 349 (1962);

Didinger v. Pennsylvania R. Co., 39 F. 2d 798;

Chesapeake & Ohio R. Co. v. Smith, 42 F. 2d 111, c.d. 282 U.S. 856, 51 S. Ct. 32;

Lowery v. Hocking Valley R. Co., 60 F. 2d 78;

Carpenter v. Baltimore & Ohio R. Co., 109 F. 2d 375;

Nashville, C. & St. L. R. Co. v. York, 127 F. 2d 606;

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926;

Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S. Ct. 445;

Metzger v. SS Kirsten Torm, 245 F. Supp. 227 (D. Md. 1965);

Smith v. J. Lauritzen, 201 F. Supp. 663 (ED Pa. 1962);

Knox v. United States, 294 F. 2d 354 (3d Cir. 1961);

Holley v. Manfred Standsfield, 186 F. Supp. 212 (ED Va. 1960);

Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2d Cir. 1950) c.d. 342 U.S. 904, 71 S. Ct. 614;

Reid v. Quebec Paper Sales & Transp. Co. Ltd. 340 F. 2d 34 (2d Cir. 1965);

Petitioner, having stipulated to the elimination of any controversial issue of fact by adopting respondent's version, renders the question of liability one of law, calling for the exclusive decision by the Trial Court.

Implicit in the respondent's contention that the petitioner was guilty of negligence in using the jury rig which was dangerous, is the admission that the winch was not reasonably safe for the purpose intended.

The negligence of the petitioner, if any, does not constitute a basis for exoneration from liability for

unseaworthiness.

The allegation that the petitioner admitted that he kicked the cable in order to have it function properly is the fact that the cable did override and did not function in a seaworthy manner.

The respondent's contention that petitioner's conduct created the unseaworthiness in question has no support in law.

This contention is not the law, but is contrary to well established and uniform law, as pointed out in the case of *Skibinski v. Waterman Steamship Corporation*, 360 F. 2d 539 (1966), where the Court stated at page 542:

> "In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship. See Puddu v. Royal Netherlands Steamship Company, 303 F. 2d 752, 757 (2d Cir.), cert. denied, 371 U.S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) (Hays, J., concurring)."

In the case of *Gibbs v. Kiesel, supra*, the Court of Appeals for the Fifth Circuit considered that it was not error to decide the question of liability as a matter of law and have the jury pass upon uncontroverted and admitted questions of fact.

The admitted and uncontroverted facts in the instant case supported the motion for summary judgment and said motion should have been granted in petitioner's favor on liability.

As recently as December 22, 1965, the Court of Appeals for the Second Circuit in the case of *D'Amico v. Lloyd Brasileiro Patrinonic Nationale*, 354 F. 2d 33, held that the Trial Judge had no alternative but to direct a verdict in favor of a seaman where there was no genuine issue of fact as to the cause of the accident.

The foregoing decision is squarely in line with the holding by the Court in the case of *Hemphill v. Mississippi Power Co.*, 84 F. 2d 971, wherein the Court stated: (p. 972)

> "It is urged on behalf of plaintiff that the question of negligence is always for the jury. This is true where there is substantial conflict in the evidence but where the undisputed facts demand a verdict, it is the duty of the judge to direct it. Atchison, T. & S. F. Ry. v. Toops, 281 U.S. 351, 50 S. Ct. 281, 74 L Ed. 896."

Further proof that petitioner was denied a fair and impartial trial:

In the opening statement respondent's counsel misstated the law as follows: (96, 97 of minutes)

> "-----and particularly in the process of your deliberations back in that juryroom, that you keep in mind what the evidence will show and ask yourself this question: What did Charlie Green do wrong?
>
> And answer that question specifically.
>
> Because Charlie Green is the only Defendant in this lawsuit and you have to find specifically that Charlie Green did something wrong.

MR. RASSNER: That is objected to, Your Honor. That certainly is not the law. Our first cause of action is that, conceding that Charlie Green did nothing wrong.

THE COURT: All right.

MR. RASSNER: I object to counsel telling the Jury what the law is.

THE COURT: I have your objection. Now, ladies and gentlemen, there are two causes of action in this case.

One is predicated on the question of unseaworthiness, and you will be instructed about the law applicable thereto.

The other is on the charge of negligence, and you will be instructed about that.

And you may proceed."

This erroneous mis-statement of the law by respondent's counsel was given the force and effect of the law of the case by the Court going into a lengthy discussion of the unrelated elements of negligence, including the following statement by the Court.

"—it must appear that the injury was the natural and probable consequence of the negligence or wrongful act or unseaworthiness and that it ought to have been foreseen in the light of the attending circumstances."

This is not the law and clearly erroneous.

This misinformation as to the applicable law is so

basically in error as to require no specific exception for review by an Appellate Court in order for petitioner to have the benefit of an appeal.

Further proof of fundamental and basic error is the manner in which the Trial Court nullified petitioner's counsel's exception to the Court's charge which, in substance, consisted of a technical statement of the correct law buried from view and consideration by an avalanche of unrelated elements of contributory negligence which created confusion as to the law of the case instead of an informative instruction.

At the conclusion of the Court's instructions, petitioner's counsel felt that the instructions constituted a directed verdict for the defendant and stated so in the following words:

> "MR. RASSNER: I will state further that it is tantamount to a Directed Verdict for the Defendant to omit that charge, insofar as we have conceded everything else that Your Honor has said constituted unseaworthiness."

The error of the Court's charge was specifically called to the Court's attention by petitioner's counsel:

> "MR. RASSNER: Counsel have a difference of view. I think the Jury is left without adequate instruction, and I take exception to Your Honor's failure to do so, if you do not do so.
>
> Of course I made my request to the Court; and I would like Your Honor to consider the fact that, insofar as was practicable, my entire case and my summation has been based on the fact that the absence of a sufficient number of men to do a particular job - - - with the concession

that otherwise the vessel was seaworthy - - - would be prejudicial to the Plaintiff; and I respectfully ask Your Honor to charge the Jury that the definition of unseaworthiness includes the absence. And I think it is basic and fundamental - - - the absence of a sufficient number of men to do a particular job.

Since we have made a concession that everything that Your Honor has mentioned was seaworthy, it leaves us with nothing.

We have no basis for a verdict then if Your Honor doesn't charge them.

And it is in the Pretrial Order.

We haven't any basis for a finding of unseaworthiness without that charge.

THE COURT: I will give considerations to those matters."

The Court thereupon reconvened the jury to correct his erroneous instruction, but failed to do so.

When the jury was recalled for further instruction after petitioner's counsel raised objection to the charge, there was no correction, in fact rather approval, in substance, of the erroneous comments by respondent's counsel of the law of the case, which is demonstrated by the following which took place during respondent's counsel's opening statement:

"Now, obviously in any accident - - - particularly an accident of this nature - - - somebody has to have done something wrong.

MR. RASSNER: I object to that. That is not our first cause of action. We never complained that anybody did anything wrong.

THE COURT: All right, Counsel, you have your objection.

MR. RASSNER: May I have my objection sustained and the Jury instructed to disregard that "somebody must be proven to have done something wrong"?

THE COURT: I am going to instruct the Jury and I am sure that counsel will argue this within the framework of the instructions.

I have your objection, counsel. You may be seated.

MR. RASSNER: May I have the instruction to the Jury now to disregard the last comment of counsel?

THE COURT: No, sir. You may proceed, counsel.

MR. BEVERLY: To begin again: Obviously, in any accident - - - particularly one of this type - - - somebody has to have done something wrong.

MR. RASSNER: I object to that, Your Honor. Now, he has done that twice and that is not the law.

THE COURT: Ladies and gentlemen of the Jury, I will instruct you as to the two causes of action and I will attempt to do that within the framework of the instructions.

Counsel is entitled to latitude in arguing, and I am instructing him that he may do that, and he understands what the Court's instructions will be and I believe he will do that within that framework.

And I have your objection, counsel.

All right, you may proceed.

MR. BEVERLY: Yes, sir. Your Honor, if I could be allowed to complete my sentence, maybe this would alleviate part of counsel from New York's problem.

Again, in an accident of this type - - - as in most every accident - - - somebody has to have done something wrong.

In this case, somebody did do something wrong.

Now, the allegations are, of course, that Charles Green did something wrong."

Instead of correcting these erroneous, misleading and prejudicial statements of the law, the Court ordered petitioner's counsel to "sit down".

The Court erroneously refused to sustain petitioner's objection to respondent's counsel's appeal to prejudice and passion and to the inference that the respondent was uninsured, as appears by the following:

"Now, Charles Green is a man who was born and raised here in Fort Myers, Florida.

He started working in the fishing business as a young

man. He has grown up in the fishing business.

MR. RASSNER: If Your Honor please, I object to that. This is an appeal to prejudice.

THE COURT: Counsel, I am going to ask you to restrain yourself now. You are out of order in making that statement.

The Jury is entitled to determine this.

I am going to instruct them that they are not to make their determination on the basis of any prejudice or sympathy for either party, but these are reasonable matters for argument by counsel; and the Court will decide that and I will inform him if he gets out of line in that regard.

In the meantime, I will ask you please to be seated.

MR. RASSNER: Yes, sir.

THE COURT: All right. You may proceed.

MR. BEVERLY: The point is this. This is a man who has grown up in this community, and whether he was in this community or any other community is immaterial.

The fact is that this is a man who has worked all his life and he is going to continue working for the remainder of his life; and money, to him, doesn't come any easier than it does to me or any other working man.

So keep in mind that he is the individual Defendant in this lawsuit. That your verdict, if returned against Mr.

Green, will be against Mr. Green, individually."

Further prejudice to the petitioner's case was the comments by the Trial Court to petitioner's counsel to "sit down" when petitioner's counsel was endeavoring to protect the rights of a seaman in the Federal Court by means of voicing what petitioner's counsel considered valid objection.

It is respectfully submitted that the Court was in error in failing to act sua sponte in correcting the following incorrect statement by respondent's counsel of the law of the case.

> "Because, again, we are back to the same thing; and that is who did what wrong?
>
> Remember I asked you on Opening Statement to place one question in your mind and attempt to keep it there throughout the duration of this lawsuit and see how you would answer it.
>
> That question was: What did Charles Green do wrong?
>
> And I would simply suggest to you at this point that the evidence is, I think, very clear that Charles Green has done nothing wrong."

The Court below was in error in sustaining a judgment entered on a verdict arrived at in the absence of any understandable or applicable instructions as to the law of the case.

In the case of *Sprague v. The Texas Company*, 250 F. 2d 123, the Court stated:

> "Because of the undisputed evidence on the subject as to

unseaworthiness the direction of a verdict in plaintiff's favor was proper and the judgment is affirmed." (p. 124, 250 F. 2d)

The vessel was unseaworthy as a matter of law. *Ballwanz v. Isthmian Lines, Inc.* 319 F. 2d 457 (4 Cir. 1963).

In the case of *June T, Inc. v. King*, 290 F. 2d 404 (1961), the Court stated at page 407:

> "Conducting the operations with a single crew member, the seaman hauling in nets from the starboard side could not be both on the starboard side as occasion demanded and on the port side to stop the winches if trouble arose. The fact finder had a rational basis for concluding that for the operations contemplated, there was more for one man to do than was reasonably prudent. Of course, to be inadequately or improperly manned is a classic case of an unseaworthy vessel. See Boudoin v. Lykes Bros. S.S. Co., Inc., 1955, 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354, 1955 A.M.C. 488."

> "The Judge likewise credited the plaintiff's testimony that the cable was piling up on the winch drums and that some action was necessary. The action taken by him certainly could not be held as a matter of law to have been the sole cause. Donovan v. Esso Shipping Co., 3 Cir., 1958, 259 F. 2d 65, 66-67, 1958 A.M.C. 2096. To the extent that it was contributory, this would merely reduce the damage award. Cox v. Esso Shipping Co., 5 Cir., 1957, 247 F. 2d 629, 636, 1957 A.M.C. 1927."

Assuming that the petitioner kicked the cable, it in nowise excuses the respondent for its breach of warranty of seaworthiness.

In the case of *Texas Menhaden Company v. Johnson*, 332 F. 2d 527 (5 Cir. 1964), the Court held the vessel liable when the line that libelant was handling caught his hand and crushed it against a spool.

The cases of *Gibbs v. Kiesel*, 382 F. 2d 917 (1967), *Saunders v. Pool Shipping Co., Ltd.*, 235 F. 2d 729 and *June T, Inc. v. King, supra*, clearly demonstrate the vessel's liability.

See also:

Seas Shipping Co. v. Sieracki, 328 U.S. 65;

Petterson v. Alaska Shipping Co., 205 F. 2d 478, aff'd 347 U.S. 396; 74 S.Ct. 601.

Rogers v. U.S. Lines, 205 F. 2d 57, rev'd per curiam 347 U.S. 984, 74 S. Ct. 849;

Mollica v. Compania Sud Americana de Vapores, 202 F. 2d 25 (CCA 2d);

Amador v. A/S J. Ludwig Mowinckels Rederi, 224 F. 2d 437 (CCA 2d);

Nelson v. Robin Line S.S. Co., 39 F. 2d 430;

Mahnich v. Southern S.S. Co., supra;

Arizona v. Analich, 298 U.S. 110, 56 S. Ct. 707;

Southern Railway-Carolina Division Co. v. Bennett, 233 U.S. 80, 34 S. Ct. 566;

Sweeney v. Erving, 228 U.S. 233, 33 S. Ct. 416;

Southern R. Co. v. Derr, 240 F. 73;

Baltimore & Ohio R. Co. v. Kast, 299 F. 419, c.d. 266 U.S. 613, 45 S. Ct. 95;

The decision by the court below charging the unrelated principles of negligence law was not cured by the mention of the correct law concealed from the jury's comprehension by the confusing comments as to the principles of unrelated law. The Supreme Court, Appellate Division, First Department, in the case of *Nantasket, Inc. v. E. F. Raboy & Co.*, 31 A.D. 804, 297 N.Y.S. 2d, 684, stated at page 686:

> "While the Court had properly charged the general principles of law applicable to the respective causes of action, upon request plaintiffs were entitled to a clear and unequivocal charge that plaintiff's negligence, if any, was not a defense to the causes of action for breach of contract. From a reading of the entire charge and refusals to charge, we are unable to say that the jury was not confused as to the relationship of plaintiffs' negligence, if any to the causes of action in contract. (Bacon v. Celeste, 30 A.D. 2d 324, 292 N.Y.S. 2d 54).

In the instant case the trial court charged at great length as to the law of negligence, unconnected with the law of the case. Accordingly, the decision by the court below was in conflict with that of the United States Court of Appeals of the 6th Circuit, in the case of *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163 (1967), wherein the following appears at page 167:

"It is also claimed that the court erred in questioning the plaintiff's witness, Mr. Billings, on his testimony before it in another trial. The previous trial was unconnected with the case at bar and we think the questioning was out of order and tended to be prejudicial to the plaintiff.

* * *

In the case of *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (1960), the error comes squarely within the concept. The Court stated at page 102:

"The question of liability in the present case was submitted to the jury with what was tantamount to no instructions at all. Few more fundamental errors with respect to a charge can be conceived. A holding that counsel's failure to take exception to such a procedure bound his client would, in our opinion, result in a gross miscarriage of justice."

The decision by the court below is in conflict with the uniform concept of applicable law not only laid down by the United States Supreme Court, the various courts of appeal, as heretofore noted, but of the State Court of New York, as set forth in the Nantasket case, supra.

CONCLUSION

1. Petitioner having conceded that respondent's version of the physical conditions of the place of the accident could be considered as correct, thus obviating any conflict of fact, the decision as to liability became a question of law exclusively within the province of the Court for decision pursuant to 45 U.S.C.A. § 51, as interpreted by this

Honorable Court in the case of *Brady v. Southern R.R. Co.* 420 U.S. 476, 64 S.Ct. 232, and other decisions, supra.

2. Where prejudicial error is apparent on the face of the record, failure to object does not constitute a waiver of the right to appeal.

3. When instructions to the jury are tantamount to no instructions at all, failure to take exception to such procedure is reviewable on the appeal to avoid a gross miscarriage of justice.

4. When an Appellate Court enunciates a revolutionary concept in conflict with holdings by the Supreme Court and other Courts of Appeal, such decision merits consideration by the United States Supreme Court, particularly where it is quite apparent that a litigant was denied equal justice to that uniformly accorded to other litigants on identical facts.

5. The decision by the Court below affects every litigant's right to a fair and impartial trial and uniform and equal administration of justice.

6. The Court, over objection directing petitioner's counsel to sit down ratified respondent's counsel as to the erroneous statement of the law which was, in substance, as follows:

That petitioner could not recover unless he proved that Charles F. Green, a local uninsured resident, had personally wrongfully caused the accident.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

HOWARD LITTLE,

Plaintiff,

vs.

CHARLES F. GREEN,

Defendant.

Notice is hereby given that HOWARD LITTLE, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order of August 1, 1968 denying plaitiff's motion for summary judgment; the order of November 21, 1968 denying plaintiff's motion for a rehearing of the motion for a summary judgment; from the judgment entered in this action on the 4th day of December, 1968 based on the jury's verdict in favor of the defendant and against the plaintiff; from the Court's denial of plaintiff's motion for a directed verdict at the close of the entire case and from the order of Hon. Ben Krentzman, U.S.D.J. of December 23, 1968, which denied plaintiff's motion for a new trial and the judgment thereon.

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I hereby certify that a true copy of the foregoing was mailed to Beverly, Moyle, Gentry & Jones, Esqs., Attorneys for Defendant, 707 N. Flagler Drive, West Palm Beach, Florida this 8th day of January, 1969.

s/ Jacob Rassner

ORDER DATED NOVEMBER 21, 1968

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA FT. MYERS DIVISION

HOWARD LITTLE,

Plaintiff,

vs.

CHARLES F. GREEN,

Defendant.

THIS CAUSE came on for consideration upon the plaintiff's Motion for Summary Judgment pursuant to the Federal Rules of Civil Procedure, Rule No. 56. The plaintiff's motion for summary judgment was originally heard before the Honorable Joseph P. Lieb and denied by his order of August 1, 1968. There has not been any additional or new affidavits, memoranda or information submitted by the plaintiff or the defendant in relation to the motion for summary judgment.

The Court has considered the plaintiff's motion for rehearing, the original motion for summary judgment, supporting memoranda and affidavits and is otherwise advised in the premises. It is, therefore,

ORDERED and ADJUDGED:

That the plaintiff's motion for a rehearing of the motion

for summary judgment be and the same is hereby denied.

DONE and ORDERED at Tampa, Florida, this 21st day of November, 1968.

Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

JUDGMENT OF JUDGE KRENTZMAN DATED JAN. 13, 1969

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FORT MYERS DISTRICT

HOWARD LITTLE,

Plaintiff,

vs.-

CHARLES F. GREEN,

Defendant.

FINAL JUDGMENT

THIS CAUSE having been tried on the issues of negligence and unseaworthiness before a jury at Fort Myers, Florida, and a verdict of not guilty having been entered by the jury on December 4, 1968, it is

ORDERED AND ADJUDGED that the Plaintiff shall take nothing by his suit against the Defendant, CHARLES F. GREEN, and the Plaintiff shall go hence without day. The amount of maintenance and cure to which Plaintiff is entitled, if any, having been severed upon stipulation of the parties from the issues presented to the jury herein, shall be fixed by the Court upon final hearing to be set upon proper motion by the Plaintiff.

DONE AND ORDERED at Tampa, Florida, this 13th day of January, 1969.

Ben Krentzman
United States District Judge

ORDER DATED DECEMBER 23, 1968

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FT. MYERS DIVISION

HOWARD LITTLE,

Plaintiff,

vs.

CHARLES F. GREEN,

Defendant.

ORDER

THIS CAUSE came on for consideration upon the plaintiff's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. The Court has considered the motion and is otherwise advised in the premises. It is, therefore,

ORDERED and ADJUDGED:

That the plaintiff's motion for a new trial be and the same is hereby denied.

DONE and ORDERED at Tampa, Florida, this 23rd day of December, 1968.

BEN KRENTZMAN
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

ORDER DENYING PETITION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28161

HOWARD LITTLE,

Plaintiff-Appellant,

versus

CHARLES F. GREEN,

Defendant-Appellee,

Appeal from the United States District Court for the Middle District of Florida

---

Before BROWN, Chief Judge, COLEMAN and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's petition for an order enlarging the time for filing of a petition for rehearing en banc in the above cause is hereby DENIED.

OPINION OF COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28161

HOWARD LITTLE,
Plaintiff-Appellant,
versus
CHARLES F. GREEN,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(June 24, 1970)

Before BROWN, Chief Judge, COLEMAN and CLARK, Circuit Judges.

CLARK, Circuit Judge: Howard Little, a seaman who was injured while working as a member of the crew of the shrimp trawler ROVING GAMBLER, sued Charles F. Green, the owner of the vessel. Little's complaint contained a count under the Jones Act[1] for negligence, and a count under the General Maritime Law for breach of the warranty of seaworthiness.[2] The issues of negligence and unseaworthiness were tried to a jury and a general verdict was returned for the defendant. The plaintiff appeals on a claim of confusion between the legal principles applicable to negligence and the strict liability doctrine of unseaworthiness which allegedly arose both in statements of counsel to the jury and in the instructions of the court. He also contends the ROVING

[1] 46 U.S.C.A. Sec. 688 (1957).

[2] The complaint also contained a count for maintenance and cure, but this issue was separated from the rest of the case and reserved for the court. It is not before us on this appeal.

GAMBLER was unseaworthy as a matter of law. Finding no reversible error in the record, we affirm.

Plaintiff Little was acting as a rigman on the ROVING GAMBLER on January 6, 1967. He was operating winches to bring in the nets used for catching shrimp when the cable attached to the net overrode or wound upon itself on the winch drum. Little tried to correct the override by kicking it. His leg was caught in the cable and drawn into the winch and he was seriously and permanently injured.

At the time of the accident the ROVING GAMBLER had a crew of three: a captain who was in command and usually piloted the vessel; a rigman who operated the winches which lowered and raised the nets; and a header who cut off the heads of the shrimp. Both the captain and the leader were supposed to assist in certain phases of the net operations.

The ROVING GAMBLER operated two large trawl nets simultaneously — one off each side of the vessel — by trailing them from cables attached to port and starboard booms known as outriggers. The forward end of each trawl net was held open when in the ocean, by a pair of heavy wooden vanes called doors. Each net and set of doors was put out and hauled in through power supplied by a separate deck mounted winch. Each winch utilized approximately 150 fathoms of cable. This cable was shackled to an additional forty fathoms of double cable forming a bridle which ran to each of the doors.

Each winch was separately controlled by a pair of levers. One lever mounted horizontally and close to the deck of the ship, was operated by foot. This horizontal lever functioned as a brake to stop and hold the winch drum. The other lever was mounted in a vertical position and was intended to be

operated by hand. By means of a friction coupling, this vertical lever caused power to be transferred to the winch. This power operated only in one direction (that of winding in the cable and nets), since the drag of the water on the nets as the boat moved forward supplied the necessary force to carry out the nets. The vertical levers were arranged so that pushing them toward each other operated the winches. Releasing the vertical levers released the friction coupling and permitted the winches to roll free, unless the foot lever brake was applied. When raising the nets, the captain reduced the speed of the trawler but remained in the wheelhouse until the bridle broke water, at which time the speed was further reduced and the captain was to come back to the winch and assist in the final operations necessary to bring up the nets.

The cable on the ROVING GAMBLER's winches was made of metal and was 3/8" in diameter. As it wound onto the winch, the size of the cable and the tension induced by the drag of the net were normally sufficient to keep it from overriding on itself, but such a condition did occur occasionally. When the bridle had left the water and begun to wind onto the winch, the bulk of the shackle and the double cable made it more likely that an override would occur than when the single cable was being taken in. Such an override of either the cable or the bridle was undesirable but it was not a major problem. No mechanical means of correcting an override was provided on the winches aboard the ROVING GAMBLER and no regularly used or known mechanical device for correcting such overrides was disclosed by the proof. One of Little's witnesses testified:

> "Q Well, is there any other way for a man to do it [i.e. prevent or correct an override]? That you know of?

"A One of the latest methods we use, we have what we call a guide — I think one of our boats has it. It is a piece of steel that we put down over the bridle and it has a handle on it and we guide both those bridles in with that handle.

I haven't used it. I don't know how effective that is.

"Q You do not have a mechanical means?

"A There is no other way except physical — you could use your hands or your feet. That is the only way it can be done. Or just let is go like it is.

"Q You know of no other method of getting that cable back?

"A No." (Emphasis supplied)

The preferred method of eliminating an override was for one of the crew members to tap the cable lightly with his hand. Instead of following this practice, Little chose to kick the cable on the occasion of his injury.

Acting without the captain's knowledge, Little had chained together the vertical levers that controlled the power to the two winches operating the separate nets with a jury rig appliance he had brought aboard. The effect of this chain device was to keep the power to the winches locked in the on or incoming position without the necessity for the rigman's holding the two levers with his hands. Consequently, when Little's foot was caught, the winch power could not be stopped by simply releasing his hand hold on the levers.

In his brief and argument here, Little urges reversal on

these points: (1) The vessel was unseaworthy as a matter of law. (2) Counsel for defendant, in his opening statement and closing argument, misstated the law applicable to unseaworthiness by intimating that the jury must find that Green had done something "wrong" in order for Little to recover and the court failed to correct the misimpression conveyed by such statement. (3) The instructions of the court failed to properly set out the law to the jury, in that they were confusing and improperly commingled principles of negligence and unseaworthiness.

Little makes no valid challenge of the jury's verdict on the negligence issue which he raised below. There is substantial evidence on which the jury could base its finding that Little knew the dangers of kicking the cable to correct an override. In fact it is without dispute that Little had been twice warned against this practice. Therefore, if he was to recover at all it must necessarily have been on the basis of unseaworthiness.

I.

UNSEAWORTHINESS

In the pretrial stipulation, Little stated it to be his contention that the vessel was unseaworthy because "a cable failed to wind evenly onto the drum [of the winch] but instead overrode and that thereby an unseaworhty condition existed; [and] that there were not a sufficient number of competent fellow seamen employed to perform the work required of the plaintiff." During argument over instructions to the jury, counsel for Little stated:

> "My entire case and my summation has been based on the fact that the absence of a sufficient number of men

to do a particular job — with the concession that otherwise the vessel was seaworth[y] .... I respectfully ask Your Honor to charge the Jury that the definition of unseaworthiness includes the absence [of a sufficient number of crewmen]."

In his brief in this Court, Little again contends that the unseaworthy condition was the override. Evidence on both theories was developed in the trial court and we will consider them both on this appeal.

The Override. The jury had abundant evidence to find that an override, in itself, was not dangerous. There was testimony that the most that could happen when an override occurred was that the nets or the doors might come up out of the water unevenly, but that this difference in the location of the doors, even if it amounted to four or five feet, had no significant effect on the shrimping operations or the equipment and was in nowise dangerous to the vessel or its mission. Plaintiff testified, to the contrary, that the nets would be "torn wide open" if the doors came up unevenly, and there was other testimony that if the nets came up unevenly it was likely to throw the vessel off course. The jury had the right to resolve this conflict in the testimony against plaintiff and, therefore, the right to believe that an override was not an inherently dangerous condition that *required* correction. There was no evidence that the override aboard the ROVING GAMBLER, which Little tried to correct, was in any way a unique type of condition. It appears that an override may occur as a normal incident to the use of shrimp trawler winches. Counsel have directed our attention to no authority to support the proposition that this mere possibility of an override created an unseaworthy condition as a matter of law. In the face of abundant evidence that overrides were neither dangerous nor a condition that demanded correction

to permit continued operation and completion of the vessel's mission, we are not willing to so hold.

Plaintiff asserts that the vessel should have had some mechanical device to prevent an override. The record contains no substantial evidence that any such device in fact exists. We are only told that one of plaintiff's witnesses had information that a tool did exist that could be used to guide the bridle onto the winch drum. It should be noted that even this testimony was limited to a device to be used with the *Bridle*. There is a sharp conflict in the evidence as to whether Little's injuries occurred as the cable was being wound onto the winch drum or whether it occurred as the bridle was coming in.

On appeal we are duty bound to accept all evidence in favor of the verdict as true and to give such evidence the benefit of all permissible that would help sustain the jury's decision. *Lyle v. Bentley*, 406 F.2d 325 (5th Cir. 1969); *Aircraft and Engine Maintenance Employees, Local 290 v. I. E. Schilling Co., Inc.*, 340 F.2d 286 (5th Cir. 1965), cert. den. 382 U.S. 972, 86 S.Ct. 528, 15 L.Ed.2d 464 (1966).

This is not to say that the vessel was proven to be seaworthy merely because the evidence showed that her winches were customary in the trade. Cf. *Davis v. Associated Pipeline Contractors, Inc.*, 305 F.Supp. 1345 (D.C., W.D. La. 1968), aff. 418 F.2d 920 (5th Cir. 1969) and the dicta in *June T., Inc. v. King*, 290 F.2d 404 (5th Cir. 1961). But certainly no vessel is unseaworthy as a matter of law because it fails to carry equipment not shown to exist or if thought to exist, was not shown by some competent proof to be safer or superior to the method being used. Speculation is no substitute for probative facts. *See e.g. Travelers Fire Insurance Co. v. Taylor*, 171 F.2d 203 (5th Cir. 1949); *Cobb v. American Bonding Co. of Baltimore*, 118 F.2d 643 (5th Cir. 1941).

Insufficient Crew. Whether Green supplied a sufficient crew to accomplish the task of bringing in the trawl nets was question of fact for the jury. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed.2d 482 (1967). The evidence showed that the normal crew on a shrimper of the type of the ROVING GAMBLER is three: a captain, a tigman and a header. This is not even a controverted fact issue. Little contends, however, that the captain should have been at the winch assisting him and guiding the cable as it came up. The record shows that at the time of the accident, the captain was in the wheelhouse and further shows that the proper place for the captain at all times the cable is coming in is where he was — the wheelhouse. According to the proof, until the bridle comes out of the water the captain is supposed to carry out duties in the wheelhouse.

Because of the direct conflict in the testimony already mentioned, as to whether the bridle had come out of the water at the time of Little's injury, the jury was free to believe either Little or the captain. Since we must accept that the jury found the bridle had not come up, then obviously the captain was in the proper place and the number of men aboard the ROVING GAMBLER — to do, and doing, the job to be done — was proper.

In General. The Supreme Court said in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), that an owner is not "obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness: not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service."

The ROVING GAMBLER did not fail to meet this standard as a matter of law.

The rationale behind the doctrine of unseaworthiness is to protect seamen from dangerous conditions beyond their control.[3] Common sense says and pure mechanics confirms that if Little had not jury-rigged the vertical levers which controlled the power to the winches so that these levers did not have to be held continuously by hand to keep the winches turning, he would not have been injured. If Little's jury-rig had not locked these levers and hence the power to the winches, then the instant his foot touched the winch and he released his hold on the vertical levers the pull of the nets would have stopped the turning of the winch. His injury was attributable to his own contrivance, not to the machinery provided or procedures prescribed by the vessel. Had Little's jury-rig been part of the regular equipment on the vessel, or had some other member of the crew installed the jury-rig, the problem would be different. But here Little created his own danger and effectively caused his own injuries. The proof shows that the captain had no knowledge of the use of the jury-rig until he rescued Little. We recognize that a shipowner has been held liable under the doctrine of unseaworthiness even where he supplied a seaworthy vessel and proper appliances and crew, but an officer or crew member negligently rigged a device or appliance so as to render it temporarily unseaworthy and another crew member was injured. *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 748 (1967) and the cases there cited. Cf. *Antoine v. Lake Charles Stevedores*, 376 F.2d 443 (5th Cir. 1967); *Robichaux v. Kerr McGee Oil Industries, Inc.*, 376 F.2d 447 (5th Cir. 1967). What we are unwilling to here announce or apply is a new variation of that rule which

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[3] See Waldron v. Moore-McCormack Lines, Inc., supra

would allow recovery for a condition of temporary unseaworthiness deliberately brought about without the shipowner or captain's knowledge, by the same seaman who then injures himself upon the very defect he intentionally creates.[4] Under these circumstances the owner did not, as a matter of law, violate his absolute duty to provide a seaworthy vessel.

We therefore reject all issues by plaintiff contending that the vessel was unseaworthy.

II.

STATEMENTS OF COUNSEL

Both in his opening statement and closing argument to the jury, counsel for the Defendant Green asked the jury to determine what his client had done that was wrong. On both occasions counsel for plaintiff objected on the grounds that recovery on the theory of unseaworthiness did not depend upon a finding that anyone had done anything "wrong". The district judge — on both occasions — told the jury they would be instructed as to the law by the court. Excerpts from the record showing the statements, objections and rulings appear in the margin.[5]

[4] Unseaworthiness does not extend to the negligent use of seaworthy appliances. Imperial Oil, Ltd. v. Drilk, 234 F.2d 4 (6th Cir. 1956), cert. den. 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956). See also 2 Norris, *The Law of Seamen*, Section 618 (1962).

[5] OPENING STATEMENT

"MR. BEVERLY:...

And let me suggest to you that in the course of hearing the evidence and in the course of examining the photographs and documents that may be submitted to you, and particularly in the process of your deliberations back in that jury room, that you keep in mind what the evidence will show and ask yourself this question: What did Charlie Green do wrong?

And answer that question specifically.

....

MR. RASNER: That is objected to, Your Honor. That certainly is not the law.

Our first cause of action is that, conceding that Charlie Green did nothing wrong.

THE COURT: All right.

MR. RASSNER: I object to counsel telling the Jury what the law is.

THE COURT: I have your objection. Now, ladies and gentlemen, there are two causes of action in this case.

One is predicated on the question of unseaworthiness, and you will be instructed about the law applicable thereto.

The other is on the charge of negligence, and you will be instructed about that.

And you may proceed."

CLOSING ARGUMENT

"MR. BEVERLY ....

Now, obviously in any accident — particularly an accident of this nature — somebody has to have done something wrong.

MR. RASSNER: I object to that. That is not our first cause of action. We never complained that anybody did anything wrong.

THE COURT: All right, Counsel, you have your objection.

MR. RASSNER: May I have my objection sustained and the Jury instructed to disregard that "somebody must be proven to have done something wrong"?

THE COURT: I am going to instruct the Jury and I am sure that counsel will argue this within the framework of the instructions.

I have your objection, counsel. You may be seated.

MR. RASSNER: May I have the instruction to the Jury now to disregard the last comment of counsel?

THE COURT: No, sir. You may proceed, counsel.

MR. BEVERLY: To begin again: Obviously, in any accident — particularly one of this type — somebody has to have done something wrong.

MR. RASSNER: I object to that, Your Honor. Now he has done that twice and that is not the law.

THE COURT: *Ladies and Gentlemen of the Jury, I will instruct you as to the two causes of action and I will attempt to do that within the framework of the instructions.*

Counsel is entitled to latitude in arguing, and I am instructing him that he may do that, and he understands what the Court's instructions will be and I believe he will do that within that framework.

And I have your objection, counsel.

All right, you may proceed.

MR. BEVERLY: Yes, sir. Your Honor, if I could be allowed to complete my sentence, maybe this would alleviate part of counsel from New York's problem.

Again, in an accident of this type — as in most every accident — somebody has to have done something wrong.

Plaintiff would have us read the word "wrong" as "negligent". Although this has been one meaning which has been accorded to "wrong", "wrong" is a broad word; it has differing meanings in various contexts. It may appear as a noun, verb, adjective or adverb. In the course of the various statements complained of, "wrong" was used as an adjective, a noun and, depending upon construction, an adverb. To construe it narrowly enough to require reversal when according it a more reasonable construction would not so require, is improper. If a facile reading of the record would uphold the trial and verdict, we should certainly not attach even an equally unrestrained significance to one single word that would have the effect of requiring a reversal and another trial. Cf. *Texas & Pacific Rwy. Co. v. Jones*, 298 F.2d 188 (5th Cir. 1962).

We should view the argument in its context in the overall lawsuit. The setting and the contentions of both of the parties must be considered. In the trial court the plaintiff based his right to recover on one count of neglect or fault and on one count of unseaworthiness — which all concede to be a doctrine of strict liability or liability without fault. The argument is reasonably susceptible of a construction that defense counsel was attacking both the negligence and the unseaworthiness contentions by urging that Green was without "wrong" as to the charge of negligence and that Little's "wrong" in jury-rigging the winch levers (a condition

> In this case, somebody did do something wrong.
> Now, the allegations are, of course, that Charles Green did something wrong.
> The proof, I think, at this point indicates that if somebody did do something wrong it wasn't Charlie Green or his agent, Mr. Pacetti who was the Captain of the vessel: but, contrarily, it was Mr. Little.
> Now, I am going to talk about — I may be doing so needlessly because I think all of you understand — what he did wrong, how he did it wrong, and so forth; but I am going to try to pinpoint it for you just a moment."
> ...
> Because, again, we are back to the same thing: and that is who did what wrong?
> Remember I asked you on Opening Statement to place one question in your mind and attempt to keep it there throughout the duration of this lawsuit and see how you would answer it.
> That question was: What did Charlie Green do wrong?
> And I would simply suggest to you at this point that the evidence is, I think, very clear that Charles Green has done nothing wrong.
>
> (Emphasis supplied)

for which Green was not responsible) caused the injury of Little's leg and made the second charge of unseaworthiness untenable; therefore if anyone committed a "wrong" that injured Little, it was Little himself and not Green. But putting the spoken remarks into the broader context in which they occurred is only part of the answer to the error assigned by Little on this point.

Two principal thrusts of Little's objection were that the remarks incorrectly stated the law *and* that the attorney for the defense was usurping the court's function by telling the jury the law applicable to the case. When Little's counsel first objected the Court then and there told the jury that there were two separate legal concepts involved in the lawsuit about to be presented to them for trial and that the law applicable to each concept would be given in the instructions of the court. In closing argument when objections were raised, they were told the same thing — that the Court would give them the law. We must assume that the jurors were responsive to their oaths and took the instructions of the Court seriously and based their actions and their verdict on those instructions. Such a required assumption cuts off speculation that the jury may have been confused by this lawyer talk.

When it came to the instructions themselves, the Court very clearly told the jury that liability for unseaworthiness did not depend upon negligence, fault or blame. In part the charge stated:

> "Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the ship owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused, if it did, the injury or damage."

And the substance of this instruction was not given once but twice during the course of the charge. The facts properly proven and the law correctly applied caused plaintiff to lose his case. The result was not produced by the words of counsel opposite. We see no basis in the colloquy footnoted above to overturn this jury verdict.

III.

INSTRUCTIONS TO THE JURY

Plaintiff objects here to the giving of an instruction to the effect that recovery could only be had for injuries resulting from unseaworthiness which were foreseeable. The instruction he complains of stated:

> "In a suit such as this the basis of recovery is negligence or unseaworthiness, and the negligence of the defendant or the unseaworthiness of the ship must be the proximate cause of the injury. In order for you to find that negligence or unseaworthiness is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act or unseaworthiness and that it ought to have been foreseen in the light of the attending circumstances."

Plaintiff also contended that the Court's charge as a whole confusingly commingled principles of negligence and unseaworthiness. As to both contentions, the complete answer is that neither objection is subject to review by this Court because counsel made no timely objection to such instruction in the court below as positively required by Rule 51 of the Federal Rules of Civil Procedure.

When considering the charge to the jury, the District Judge held a conference — out of the presence of the jury — with counsel immediately after the close of the evidence. This conference was reported by the court reporter and appears in the record. The objections of counsel to various proposed

instructions were made at this time, but the Judge made it quite clear that an objection at the charge conference did not relieve counsel of the duty to object at the close of the instructions before the jury retired to consider its verdict, as is required by Rule 51, F.R.Civ.P. Under this procedure, reasons for objecting previously stated at the charge conference would not have to be restated, but the objection would. We think that this is an admirable practice: it shortens the time between the end of the charge and the time the jury can begin deliberations, it gives counsel two opportunities to be heard on instructions, it delays the time for objections to the charge until counsel have had an opportunity to hear the entire charge as a whole, and it gives the judge the opportunity to modify his charge in the light of objections informally stated at the charge conference.

At the conclusion of the court's charge, counsel for Little objected because the definition of unseaworthiness did not include the element of absence of a sufficient number of men to do a particular job and because the charge did not state *in haec verba* that the burden of proof of contributory negligence was on the defendant. After this objection was made the court recalled the jury and added these requested charges. No further objection appeared in the record before the jury retired to consider their verdict. Counsel advised this court during oral argument that although the record did not reflect it, he stood up to object after the correcting instructions had been given and before the jury retired and the District Judge made a motion with his hand for counsel to sit down, to which counsel silently acquiesced. Counsel's observation could be taken as either implying an injudicious action on the part of the trial court or temerity on the part of counsel at his client's expense. We reject the temptation to dismiss both premises. It is sufficient for us to say that it is outside of our function as a court of review to consider

contentions of this sort completely dehors the record.

The judgment appealed from is in all things

AFFIRMED.

ORDER DATED JULY 31, 1968

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HOWARD LITTLE,

Plaintiff,

-vs.-

CHARLES F. GREEN,

Defendant.

ORDER

THIS CAUSE came on for consideration upon Plaintiff's Motion for Summary Judgment, and the Court having considered said motion on the basis of the pleadings, Interrogatories and Answers to Interrogatories, depositions, affidavits, statements and briefs of counsel for the respective parties, and being otherwise fully advised in the premises, it is therefore,

ORDERED and DECREED:

That plaintiff's Motion for Summary Judgment be, and the same is hereby, DENIED.

DONE and ORDERED at Tampa, Florida, this 31st day of July, 1968.

Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 745

HOWARD LITTLE,
Petitioner,
vs.
CHARLES F. GREEN,
Respondent

BRIEF OF RESPONDENT ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

In this Brief, Petitioner, Howard Little, who was plaintiff in the District Court in and for the Middle District of Florida, and appellant in the Fifth Circuit Court of Appeals, will be referred to as the "Petitioner". Respondent, Charles F. Green, who was defendant in the District Court in and for the Middle District of Florida and appellee in the Fifth Circuit Court of Appeals, will be referred to as "Respondent". The following symbols will be used:

B - Brief of Petitioner, Howard Little

A - Appendix of Petitioner, Howard Little

Respondent cannot accept Petitioner's statement of the questions presented for review. They are couched in

language which is self-serving and assumes facts which have no foundation in the record or opinion rendered in the Fifth Circuit Court of Appeals.

It is believed that Petitioner has violated Section 5 of Rule 23(j)(4) of the Supreme Court Rules:

> No. 4 The failure of a Petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Although it is difficult to discern the precise complaints of petitioner, it is believed, based upon a thorough knowledge of this case and a Little "clairvoyance" the issues sought to be reviewed are as follows:

1. Whether the Fifth Circuit Court of Appeals' ruling concerning the statements made to the jury by Respondent's attorney requesting the jury to determine whether Green did anything "wrong" is erroneous.

2. Whether the Fifth Circuit Court of Appeals' ruling that the District Court did not err in instructing the jury as to the difference between liability based on negligence as opposed to breach of warranty of seaworthiness is erroneous.

Other sections of Petitioner's brief raise the issues of whether there existed unseaworthiness as a matter of law (B 20) and whether the District Court erred in failing to grant Petitioner's motion for a summary judgment and directed verdict. (B 19).

This type of approach would appear to violate Rule 23(c) of the Supreme Court Rules which does not permit the raising of additional questions other than those

set forth in "Questions Presented". Such argument should be disregarded. However out of an abundance of caution a rebuttal to these questions will be included in this brief.

STATEMENT OF THE CASE

Petitioner has not supplied the essential information in his statement of the case to support the issues raised in the Argument section of his brief. In an effort to clarify the issues, Respondent will partially assume this burden.

On November 21, 1968, the District Judge denied Petitioner's Motion for Summary Judgment. Before the Court at that time were the depositions of Little and Captain Pacetti of the ROVING GAMBLER. The affidavit of David G. Hanlon was also on file. Pacetti's and Little's testimony reflected the facts set forth in the Court of Appeal's Opinion. Pacetti in his deposition stressed that had Little not locked the friction lever on his ship's winch with his homemade "jury rig", the gear on the winch would have disengaged when Little's foot caught in it thus completely preventing any injury to the seaman. Hanlon's affidavit stated that the cause of the injury to Little was the placing of the "jury rig" over the friction handles of the winch and kicking the cable.

Little had testified on deposition that he did not kick the over-ride. He claimed that he slipped and fell into the winch. The rest of the material facts are fully set forth in the Circuit Court of Appeals' Opinion.

ARGUMENT

The grounds for this Court's granting certiorari are well known. They are essentially set forth in Rule 19(1)(b) of the Supreme Court Rules:

> Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial laws; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for an exercise of this Court's power of supervision.

None of these grounds are *apparently* asserted by Petitioner except conflict of the decision in the case sub judice with decisions of other District Courts. (B 3) Petitioner has failed to demonstrate any such conflict.

A. ALLEGED ERROR IN FAILING TO GRANT PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The District Court's Opinion does not even mention the question of whether or not the District Court erred in denying Petitioner's Motion for Summary Judgment. The three issues decided by a Court of Appeals were stated in its opinion as follows:

> "In his brief and argument here, Little urges reversal on three points: (1) The vessel was unseaworthy as a matter of law. (2) Counsel for defendant, in his opening statement and closing argument, mis-stated the law applicable to unseaworthiness by intimating that the jury must find that

> Green had done something "wrong" in order for Little to recover and the Court failed to correct the mis-impression conveyed by such statement. (3) The instructions of the Court failed to properly set out the law to the jury, in that they were confusing and improperly comingled the principles of negligence and unseaworthiness."

Petitioner has not cited or quoted any case from another Court of Appeals which collides with the Fifth Circuit's Opinion. In fact, the Circuit Court's decision is fully supported by ample authority. In *Realty Investment Co. vs. Armco Steel Corporation,* (8 Cir. 1958) 255 Fed. 2nd 323, it is stated:

> "* * * * A summary judgment upon motion therefore by defendant should never be entered except where the defendant is entitled to its allowance beyond all doubt; only where the conceded facts show defendant's right with such clarity as to leave no room for controversy; with all reasonable doubts touching the evistence of a genuine issue as to a material fact resolved against the movents; giving the benefit of all reasonable inferences that may reasonably be drawn from the evidence to the party moved against."

Petitioner claims to have adopted Respondent's version of the accident thereby supposedly eliminating all "controversial issues of fact". (B 19) This argument cannot stand the test of many favorable inferences which can be deduced from the testimony. The facts upon the motion were essentially the same as stated in the Court of Appeals Opinion. They present a situation which, when taken in the light most favorable to Respondent, warrant a finding that the vessel was seaworthy, that the over-ride was not the approximate cause of the accident. Little himself was the sole cause of the accident, and Little was contributorily negligent.

If this is what Petitioner is stipulating to in supposedly removing all actual conflict, no further argument is necessary. Petitioner has demonstrated no ground for granting his petition for certiorari on this point.

B. UNSEAWORTHINESS

Upon Appeal, Petitioner claimed the ROVING GAMBLER was unseaworthy as a matter of law because of the common occurrence of the over-ride on the ship's winch and failure to provide an adequate crew. Petitioner has *apparently* limited his argument here to "conflict" on the question of unseaworthiness as a matter of law because of the occurrence of the over-ride condition on the winch cable. (B 7-8; 20, 29-30) The Circuit Court of Appeals held:

> *"The over-ride.*
>
> The jury had abundant evidence to find that an over-ride, in itself, was not dangerous. There was testimony that the most that could happen when an over-ride occurred was that the nets or the doors might come up out of the water unevenly, but that this difference in the location of the doors, even if it amounted to four or five feet, had no significant effect on the shipping operations or the equipment and was in no wise dangerous to the vessel or its mission. Plaintiff testified to the contrary, that the nets would be "torn wide open" if the doors came up unevenly, and there was other testimony that if the nets came up unevenly it was likely to throw the vessel off course. The jury had the right to resolve this conflict in the testimony against Plaintiff and, therefore, the right to believe that an over-ride was not an inherently dangerous condition that *required* correction. There was no evidence that the over-ride aboard the ROVING GAMBLER which Little tried to correct, was in any way a unique type of condition. It appears that an over-

ride may occur as a normal incident to the use of shrimp trawler winches. Counsel had directed our attention to no authority to support the proposition that this mere possibility of an over-ride created an unseaworthy condition as a matter of law. In the face of abundant evidence that over-rides were neither dangerous nor a condition that demanded correction to permit continued operation and completion of the vessel's mission, we are not willing to so hold.

* * * * * *

The rationale behind the doctrine of unseaworthiness is to protect seamen from dangerous conditions beyond their control. Common sense says and pure mechanics confirm that if Little had not jury rigged the vertical levers which controlled the power to the winches so that these levers did not have to be held continuously by hand to keep the winches turning, he would not have been injured. If Little's jury-rig had not locked these levers and hence the power to the winches, then the instant his foot touched the winch and he released his hold on the vertical levers the pull of the nets would have stopped the turning of the winch. His injury was attributable to his own contrivance, not to the machinery provided or procedures prescribed by the vessel. Had Little's jury-rig been part of the regular equipment on the vessel, or had some other member of the crew installed the jury-rig, the problem would be different. But here Little created his own danger and effectively caused his own injuries. The proof shows that the captain had no knowledge of the use of the jury-rig until he rescued Little. We recognize that a ship owner has been held liable under the doctrine of unseaworthiness even where he supplied a seaworthy vessel and proper appliances and crew, but an officer or crew member negligently rigged a device or appliance so as to render it temporarily unseaworthy and another crew member was injured. *Mocuilli v. U. S.*, 387 U.S. 237, 87 S.Ct. 1705, 18 Law Ed.2d 748 (1967) and the

cases there cited. *C.f. Antoine vs. Lake Charles Stevedores,* 376 Fed. 2d, 443 (Fifth Cir. 1967); *Rovichaux vs. Kerr McGee Oil Industries, Inc.* 376 Fed 2d, 447 (Fifth Cir. 1967). What we are unwilling to announce here or apply is a new variation of that rule which would allow recovery for a condition of temporary unseaworthiness deliberately brought about without the ship owner or captain's knowledge, by the same seaman who then injures himself upon the very defect he intentionally creates. Under these circumstances the owner did not, as a matter of law, violate his absolute duty to provide a seaworthy vessel."

Petitioner's brief in utilizing a "shotgun" approach periodically claims the ROVING GAMBLER was unseaworthy as a matter of law. No case is asserted to conflict with the Court of Appeals' decision. Each case cited fails to deal with a condition aboard ship which was created by the seaman who was injured because of the condition which he himself created and which was not a part of the vessel's gear, machinery or operating procedure.

The mere citing of cases without stating how they conflict with the decision under review is insufficient.

In *Hussein vs. Isthmian Lines Inc.* (5th Cir. 1968), 405 F.2nd 946, cited by Petitioner, (B 8) it was held that the request of the Hussein to work on a greasy ladder created an issue of fact on the question of seaworthiness. Since the Trial Judge refused to charge the jury on seaworthiness a jury verdict for Isthmian was reversed for a new trial. It is obvious that this case in no way conflicts with the decision under review.

June T Inc. vs. King (5th Cir. 1961), 290 F2d, 404, cited by Petitioner (B 29) held that the stationing of only two seamen on board a shrimping vessel upon which

King was working was sufficient for the trior of fact to find that the vessel was unseaworthy. The judgment for King was affirmed. Again, there is no similiarity between this case and the case sub judice. Conflict has not been demonstrated.

C. STATEMENT OF COUNSEL

Petitioner *intermittently* complains of prejudice in the District Court's ruling and statements in Respondent's opening and closing statements to the jury that Charles Green had done nothing "wrong". (B 21-28; 31). Petitioner contends that there was "no correction" of Respondent's misstatements but in fact the Court approved opposing counsel's remarks thus misleading the jury (B 24). The Court of Apepals' answer to this contention adequately rebutts Petitioner's position:

> "We should view the argument in its context in the overall lawsuit. The setting and the contentions of both of the parties must be considered. In the trial court the plaintiff based his right to recover on one count of neglect or fault and on one count of unseaworthiness - which all concede to be a doctrine of strict liability or liability without fault. The argument is reasonably susceptible of a construction that defense counsel was attacking both the negligence and the unseaworthiness contentions by urging that Green was without "wrong" as to the charge of negligence and that Little's "wrong" in jury-rigging the winch levers (a condition for which Green was not responsible) caused the injury of Little's leg and made the second charge of unseaworthiness untenable; therefore if anyone committed a "wrong" that injured Little, it was Little himself and not Green. But putting the spoken remarks into the broader context in which they occurred is only part of the answer to the error assigned by Little on this point.

Two principal thrusts of Little's objections were that the remarks incorrectly stated the law and that the attorney for the defense was usurping the court's function by telling the jury the law applicable to the case. When Little's counsel first objected the Court then and there told the jury that there were two separate legal concepts involved in the lawsuit about to be presented to them for trial and that the law applicable to each concept would be given in the instructions of the Coourt. In closing argument when objections were raised, they were told the same thing - that the Court would give them the law. We must assume that the jurors were responsive to their oaths and took the instructions of the Court seriously and based their actions and their verdict on those instructions. Such a required assumption cuts off speculation that the jury may have been confused by this lawyer talk.

When it came to the instructions themselves, the Court very clearly told the jury that liability for unseaworthiness did not depend upon negligence, fault or blame. In part the charge stated:

> 'Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the ship owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused, if it did, the injury or damage.'

And the substance of this instruction was not given once but twice during the course of the charge. The facts properly proved and the law correctly applied caused plaintiff to lose his case. The result was not produced by the words of counsel opposite. We see no basis in the colloquy footnoted above to overturn this jury verdict."

The Lower Court further charged the jury:

> "Plaintiff has alleged and contends that he has two distinct legal bases for recovery, one of which is based upon the maritime doctrine of Unseaworthiness. I will in the course of my charge, charge, define and distinguish these principles of law as they apply to the evidence presented in this case. * * * * Now it is not necessary for the plaintiff to prove both unseaworthiness and negligence. It is enough that the plaintiff proves either one and if the plaintiff does so to your satisfaction under the evidence, and under the law as will be given in these instructions, then plaintiff is entitled to recover a verdict."

It is evident that Petitioner's argument on the question of whether the Court should grant certiorari is directed towards the merits of the case as opposed to demonstrating why this Court should grant his petition. No case with similar facts or reciting principles of law which conflict with the Fifth Circuit Court's decision in this case is cited. All decisions cited have been carefully reviewed and have been found completely unrelated and inapplicable.

D. INSTRUCTIONS TO THE JURY

On appeal to the Fifth Circuit, Petitioner claimed that the District Court in instructing the jury comingled the principles of negligence and unseaworthiness. Respondent is unable to add to the Circuit Court's findings in its decision in this regard. (A 14-15)

The District Court complied with Petitioner's request after its initial charge to the jury and gave the charges requested by Petitioner. After the second charge, Petitioner's counsel made no objection. The Circuit Court of Appeals found that none of the Court's instructions were erroneous and that Petitioner's counsel failed to object after the second charge, thus violating Rule 51, F.R.C.P. which requires objections to

instructions be made after they have been given to the jury.

Petitioner repeatedly insists that the Circuit Court's opinion violates the principle that one need not object to a fundamental and highly prejudicial error. (B 9; 11-16, 32). This position ignores the finding of the Court of Appeals that no error was found in the Court's instruction, much less a "fundamental error".

As an illustration that Petitioner's contentions are without merit an analysis of *Freifield vs. Hennessy,* (3d Cir. 1965), 353 F 2d 97, cited by Petitioner, (B9), readily discloses the lack of alleged conflict.

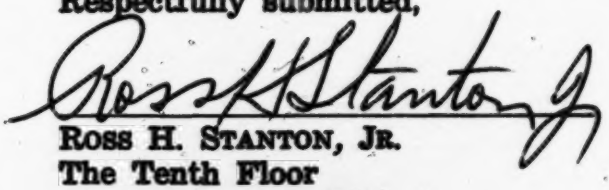
Hennessy, while driving an automobile, was suddenly struck by a seizure causing him to lose consciousness and run over one, Gerald McFall, age five, resulting in the minor's death. Freifield brought suit as Administrator of McFall's estate. The Lower Court instructed the jury that if Hennessy's "blackout" was the result of an "act of God", Hennessy should be exonerated. Freifield's attorney made no objection to the instruction. The Third Circuit Court of Appeals reversed holding that such a fundamental and obvious error could not be sanctioned and no objection to the instruction was required. The facts in this case and the Third Circuit Court of Appeal's ruling is completely unrelated to the facts in the case at Bar.

There has been no demonstration by Petitioner on this point that certiorari should be granted.

CONCLUSION

It is extremely difficult to discern the precise reason why Petitioner believes this Court should grant certiorari. The argument is fragmented to such an extent that argument on the various points attempted to be asserted appears intermittently on the same issue throughout Petitioner's brief. This shotgun approach has failed to demonstrate conflict with another decision of another Circuit Court of Appeal with the decision rendered in the case sub judice. No cases with similar factual or applicable principles of law which have not been followed in this case have been cited in the Petitioner's brief. The petition for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 19th day of October, 1970, two copies of the foregoing Brief were furnished by mail to Jacob Rassner, Esq., Attorney for Petitioner, 15 Park Row, New York, New York, 10038.

Ross H Stanton Jr

Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 736

JOHN KELLERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and others were convicted of mail fraud and conspiracy in connection with a scheme to sell and distribute counterfeit Diners Club credit cards. The court of appeals affirmed (Pet. App. A).

The petition seeks to recanvass issues regarding the sufficiency of the evidence which were fully presented to and dealt with by the court below. Those

issues raise no question warranting further review here. In any event, the contentions are fully answered in the opinion of the court below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 746

HOWARD LITTLE,

Petitioner,

vs.

CHARLES F. GREEN,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE
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vs.

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Respondent.

PETITIONER'S REPLY BRIEF

Respondent objects to the petitioner's plea for a writ of certiorari asserting, in substance, that there was adequate factual proof to sustain the jury's verdict.

In the Court below, petitioner did not question the sufficiency of the factual proof to sustain the jury's verdict.

The opinion by the Court below holding that the weight of evidence was sufficient to sustain the jury's verdict is entirely foreign to petitioner's charge that he was denied equal justice. Now, the respondent likewise raises the immaterial and irrelevant question as to the weight of evidence.

Petitioner does not question the sufficiency or weight of the evidence to sustain a defendant's verdict. Petitioner claims the right to a fair and impartial trial, denied to him by the Trial Court, and such denial was not even mentioned in the opinion by the Court below.

Petitioner submits that he was entitled to have the Court below pass on the basic question as to whether or not the accumulation of improper appeals to bias, passion and prejudice by defense counsel to a local jury, including reference to the economic standing of respondent, erroneously stating that he was uninsured when, in fact, he was insured, constituted a denial of equal justice.

In addition thereto, the failure of the Trial Court to correct the erroneous statement of the law by defense counsel and ordering petitioner's counsel to "sit down" when petitioner's counsel objected to the erroneous statement of law, and misinforming the jury, in substance, that petitioner's counsel was indulging in improper objections, and that defense counsel was justified in the aforesaid erroneous remarks, certainly constituted prejudicial error.

There can be no question that the prejudice suffered by petitioner during the trial before the jury constituted a denial of a fair and impartial trial; and, the failure of the Trial Court to adequately instruct the jury as to the law of unseaworthiness, free from injecting irrelevant and confusing propositions of negligence law, all contributed to a miscarriage of justice.

Nothing in the decision by the Court below indicates that the Court as much as considered the charge of a denial to petitioner of a fair and impartial trial, in spite of the fact that the appeal was primarily based on the charge that the verdict was the result of bias, passion and prejudice and erroneous rulings and charge by the Trial Court.

It is respectfully submitted that the respondent's brief treats with the irrelevant and non-existing question of the weight of evidence and in nowise alters the fact that petitioner was erroneously denied his day in Court on the merits.

The error of the Trial Court and the failure of the Court below to consider petitioner's contention that he was denied a

fair and impartial trial seems to be clear and merits review by this Honorable Court.

The error of the Trial Court and the Court below comes into clear focus when considering well settled and uniform law, as expressed in the case of *Rendo v. Schermerhorn*, 24 A.D. 2d 773, 263 N.Y.S. 2d 743, wherein the Court stated:

> "Ordinarily, we are reluctant to disturb the verdict of a jury which participated in a long trial and particularly so where, as here, the trial was capably conducted by an experienced Trial Judge. Nevertheless, we can not condone the obvious reference to the lack of defendants' insurance coverage contained in defense counsel's summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors' minds (Wisniewski v. Jem Novelty Corp., 22 A.D. 2d 10, 253 N.Y.S. 2d 418; Griffin v. Corporation of the Church of the Assumption, 14 A.D. 2d 620, 218 N.Y.S. 2d 141; Kuznicki v. Kuszowski, 2 A.D. 2d 216, 153 N.Y.S. 2d 705). This determination makes unnecessary any discussion of appellant's other contentions."

See also:

> *Throckmorton v. St. Louis-San Francisco Ry. Co.*, 179 F. 2d 165, cert. denied, 70 S. Ct. 797, 339 U.S. 944, 94 L. Ed. 1359

> *Crowell-Collier Pub. Co. v. Caldwell*,170 F. 2d 941

In an action against a hotel company by cashier for slander, argument of cashier's counsel in which it was suggested that company should respond in damages because it was rich and cashier was poor, thereby implying justice should be administered unequally as between rich and poor, was ground

for declaring mistrial, particularly in absence of evidence as to financial condition of company. *Washington Annapolis Hotel Co. v. Riddle*, 171 F. 2d 732, 83 U.S. App. D.C. 288.

See: *Gleaton v. Green*, 156 F. 2d 459

In the ordinary action for damages arising out of negligence, evidence relating to liability or other insurance is inadmissible. *Theurer v. Holland Furnace Co.*, 124 F. 2d 494.

Under Virginia law, evidence as to insurance coverage is inadmissible in action against insured and prejudicial to insured, and admission of such testimony or argument of counsel disclosing insurance coverage is reversible error. *Bowie v. Sorrell*, 113 F. Supp. 373, reversed 209 F. 2d 49.

The improper remarks by defense counsel were never cured by the Trial Court although due and timely objection was taken thereto.

As a matter of fact, the improper remarks were aggravated by the Trial Court's improper reprimanding of petitioner's counsel and, in substance, approving defense counsel's incorrect statement of the law, as well as, in substance, approving defense counsel's prejudicial remarks.

Behrman v. Sims, 157 F. 2d 862, 81 U.S. App. D.C. 303

It is respectfully submitted that justice was denied to petitioner and that the question presented is one which involves the right of every citizen seeking justice in our Courts who should be afforded a fair and impartial trial, free from bias, passion and prejudice and entitled to full, correct and proper rulings and instructions by trial courts, denied to the petitioner herein.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner